

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA

v.

KIN YAN TAM

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CRIMINAL No.

98-00550-01

CIVIL No.

03-0141

Memorandum and Order

Yohn, J.

March ____, 2005

Presently before this court is defendant Kin Yan Tam's motion for relief from judgment or order pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. For the reasons stated herein, the motion will be denied.

I. Background and Procedural History

On January 11, 2000, defendant Kin Yan Tam pled guilty to four federal conspiracy counts involving a scheme to import and distribute heroin and to launder proceeds from the drug sales. He was sentenced to 240 months imprisonment on the first count, 120 months on the second count, and 252 months on the third and fourth counts, with the sentences to run concurrently.

Tam unsuccessfully appealed his conviction and his sentence. On January 13, 2003, represented by new counsel, he filed a motion under 28 U.S.C. § 2255 alleging ineffective assistance of counsel. Following a hearing, the court denied the motion. Tam appealed the denial, and by order dated December 15, 2003, the Third Circuit denied his application for a certificate

of appealability.

On August 9, 2004, Tam filed a motion to amend or supplement his § 2255 motion under Rule 15(d) of the Federal Rules of Civil Procedure, so that he could challenge his sentence under *Blakely v. Washington*, ___ U.S. ___, 124 S. Ct. 2531 (2004). By his motion, Tam sought to amend his original § 2255 motion to add the claim that the court's sentencing findings regarding the quantity of drugs involved in the offense and his role in the offense violate the new constitutional rule announced in *Blakely*.

On December 2, 2004, Tam's motion was denied by this court on the ground that amendment of a § 2255 motion under Rule 15(d) is no longer possible once the motion has been decided on the merits. I concluded that Tam's Rule 15(d) motion was, for all intents and purposes, a flawed attempt to circumvent the Antiterrorism and Effective Death Penalty Act's procedural requirement that a movant seeking to present a second or successive habeas motion in federal district court first file for authorization to do so in the appropriate court of appeals. *See* 28 U.S.C. § 2244(b)(3)(A) (requiring appellate court authorization prior to the filing of a second habeas motion).

Rather than moving in the Third Circuit Court of Appeals for authorization to file a successive § 2255 motion, Tam, on January 26, 2005, filed this Rule 60(b) motion for relief from judgment. In support of his motion, he makes essentially the same argument regarding the constitutionality of his sentence that he made in his earlier Rule 15(d) motion. Tam now invokes Rule 60(b)(5), which provides that, "[o]n motion and upon such terms as are just, the court may relieve a party...from a final judgment, order, or proceeding [if]...it is no longer equitable that the judgment should have prospective application." Fed. R. Civ. P. 60(b)(5). Tam argues that, in

light of the Supreme Court's recent sentencing-related decisions in *United States v. Booker* and *United States v. Fanfan*, ___U.S.___, 125 S. Ct. 738 (January 12, 2005) (jointly decided), it would be inequitable to continue to enforce the judgment of sentence entered against him.

II. Discussion

In *Pridgen v. Shannon*, 380 F.3d 721 (2004), which speaks directly to the issue in this case, the Third Circuit decided when a district court may reach the merits of a petitioner's Rule 60(b) motion seeking to vacate a judgment denying habeas relief. The court held that

in those instances in which the factual predicate of a petitioner's Rule 60(b) motion attacks the manner in which the earlier habeas judgment was procured and not the underlying conviction, the Rule 60(b) motion may be adjudicated on the merits. However, when the Rule 60(b) motion seeks to collaterally attack the petitioner's underlying conviction, the motion should be treated as a successive habeas petition.

Id. at 727.

The Third Circuit concluded, after surveying the law in other circuits, that allowing a district court to reach the merits of a Rule 60(b) motion challenging a petitioner's underlying conviction (rather than the legitimacy of the habeas proceeding itself) would undermine Congress's intention in enacting the AEDPA, which was to promote the finality of judgments by restricting the availability of relief to habeas petitioners. *Id.* As the court reasoned in *Pridgen*, it is implausible to believe that Congress, which enacted the AEDPA in part to curtail the ability of prisoners to file successive petitions, "wanted Rule 60(b) to operate under full throttle in the habeas context." *Id.* (quoting from *Rodwell v. Pepe*, 324 F.3d 66, 67 (1st Cir. 2003)). On the

contrary, there is every reason to believe that Congress intended to circumscribe the applicability of Rule 60(b) in habeas cases. In the wake *Pridgen*, which resolved the conflict between the permissiveness of Rule 60(b) and the restrictiveness of the AEDPA in favor of the latter, an attack on the legitimacy of a habeas proceeding is allowed under Rule 60(b), but an attack on the underlying conviction is not.

In his Rule 60(b) motion, Tam does not in any way attack the integrity of his habeas proceeding; rather, he attacks the underlying judgment in his case in light of recent Supreme Court decisions that he believes render his sentence unconstitutional. Under the Third Circuit's rule in *Pridgen*, this court lacks jurisdiction to decide Tam's Rule 60(b) motion, because the motion is unambiguously an attack on Tam's conviction. *Pridgen* requires that Tam's motion be treated not as an ordinary Rule 60(b) motion, but as a second or successive habeas motion, which is governed by the AEDPA.¹

Under the AEDPA, Tam may not file a second or successive § 2255 habeas motion without first moving in the court of appeals for an order authorizing the district court to consider the motion. 28 U.S.C. § 2244(b)(3)(A) (“Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.”); *see also Corrao v. United States*, 152 F.3d 188, 190 (2d Cir. 1998). If, as Tam argues, *Booker* and *Fanfan* announced a new rule of constitutional law that is applicable to his case and retroactive to cases on collateral review, he may be entitled to file a second habeas motion pursuant to 28 U.S.C. §

¹Tam cites *Pridgen* in support of his motion, but insofar as he believes the case is helpful to him, he misunderstands both its holding and the applicability of its holding to his situation.

2244(b)(2)(A).² However, he must first seek leave from the Third Circuit to do so. Because Tam has not sought an order from the Third Circuit that would allow him to bring a successive habeas motion in this court, his Rule 60(b) motion for relief from judgment—a thinly disguised successive § 2255 motion—must be denied.

²In actuality, the Supreme Court’s reasoning in *Booker* and *Fanfan* regarding the role of judicial fact-finding in the imposition of sentences appears to be inapplicable to Tam’s case, given that Tam stipulated in his plea agreement to the quantity of drugs for which the court found him to be responsible when sentence was imposed. *See* Motion for Relief from Judgment at 7.

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Order

Yohn, J.

AND NOW on this _____ day of March 2005, upon consideration of the motion of defendant Kin Yan Tam for relief from the judgment denying his previously filed motion for relief under 28 U.S.C. § 2255 and the government's response thereto, it is hereby ORDERED that the motion is DENIED.

William H. Yohn, Jr., Judge